IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.M.JOSEPH

WEDNESDAY, THE 7TH MARCH 2007 / 16TH PHALGUNA 1928

WP(C).No. 27513 of 2006(A)

PETITIONER:

P.M.THANKAMANI, HIGH SCHOOL ASSISTANT (RETIRED), ST.ANN'S CONVENT GIRLS HIGH SCHOOL, WEST FORT, THRISSUR, PORATHUR HOUSE, KANATTUKARA, AYYANTHOLE, THRISSUR.

BY ADV. SRI.N.P.SAMUEL

RESPONDENTS:

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1. STATE OF KERALA, REPRESENTED BY THE SECRETARY TO GOVT., GENERAL EDUCATION DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM.

2. THE DEPUTY DIRECTOR OF EDUCATION, THRISSUR.

3. THE DISTRICT EDUCATIONAL OFFICER, THRISSUR.

4. THE C.M.C.CORPORATE EDUCATIONAL AGENCY, NIRMALA PROVINCE, KOLAZHY, THRISSUR, REPRESENTED BY THE CORPORATE MANAGER.

R1 TO R3 BY GOVERNMENT PLEADER (SHRI T.T. MUHAMMED)

BY ADV. SRI.K.B.GANGESH
SRI.ANIL GEORGE

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 07/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX IN W.P.(C). NO. 27513 OF 2006 A

PETITIONER'S EXHIBITS:

EXT.P1	**TRUE COPY OF ORDER NO.B4/8423.05/K.DIS. DATED 6.9.05 ISSUED BY THIRD RESPONDENT.**
EXT.P2	**PHOTO COPY OF ORDER NO.B3-24204/05 DATED 22.12.05 ISSUED BY SECOND RESPONDENT.**
EXT.P3	**TRUE COPY OF JUDGMENT IN WP.(C). NO. 2147/06 DATED 15.2.06 OF THIS HONOURABLE COURT.**
EXT.P4	**TRUE COPY OF REVISION PETITION FILED BY PETITIONER BEFORE FIRST RESPONDENT ON 30.1.2006.**
EXT.P5	**TRUE COPY OF ARGUMENT NOTES SUBMITTED BY PETITIONER BEFORE FIRST RESPONDENT.**
EXT.P6	**TRUE COPY OF ORDER GO (RT) NO.3660/06/G.EDN. DATED 18.8.06 ISSUED BY FIRST RESPONDENT.**

// TRUE COPY//

PS TO JUDGE

K. M. JOSEPH, J.

W.P.C. NO. 27513 OF 2006 A

Dated this the 7th March, 2007

JUDGMENT

Petitioner is aggrieved by the refusal to appoint her as HM as against vacancies which arose on 31.3.2005 under the third respondent Educational Agency. Petitioner challenges Exts.P1, P2 and P6. They are orders of the Educational Authorities speaking in one voice, disapproving her challenge to the decision of the Management to appoint another teacher, no doubt, junior to the petitioner as HM.

2. I heard Shri N.P. Samuel, learned counsel appearing for the petitioner, Shri K.B. Gangesh, learned counsel appearing on behalf of the fourth respondent, besides the learned Government Pleader. It is submitted by the learned counsel for fourth respondent that it is invoking the right under Article 30 of the Constitution that the third respondent has appointed a teacher who is a Nun and who is junior to the petitioner. Counsel for petitioner raised two contentions. He would submit that the

right available to a minority institution under Article 30 is not an absolute right. The second contention he has raised is that Article 30, at any rate, cannot be used to defeat the rights of a member of the same community, when it comes to the appointment of HM. Learned counsel took me through various decisions. He also raised another contention that the right cannot be claimed by a minority institution to appoint a junior person when the institution is receiving aid from the Government. He relied on various decisions:

1) State of Kerala, etc. v. Very Rev. Mother Provincial, etc. (AIR 1970 SC 2079). Therein, the Apex Court held as follows:

> *"7. The claim of the majority community institutions to equality with minority communities in the matter of the establishment and administration of their institutions leads to the consideration whether the equality clause can at all give protection, when the Constitution itself classifies the minority communities into a separate entity for special protection which is*

denied to the majority community. This is not a case of giving some benefits to minority communities which in reason must also go to the majority community institutions but a special kind of protection for which the Constitution singles out the minority communities. This question, however, does not fall within our purview as the State, at the hearing announced that it was not intended to enforce the provisions of the law relating to administration against the majority institutions only, if they could not be enforced against the minority institutions. Therefore, we have to consider the disputed provisions primarily under Art. 30(1) and secondarily under Articles 31 and 19 where applicable.

8. Article 30(1) has been construed before by this Court. Without referring to those cases, it is sufficient to say that the clause contemplates two rights which are separated in point of time. The first right is the initial right to establish institutions of the minority's choice. Establishment here means the bringing into

being of an institution and it must be by a minority community. It matters not if a single philanthropic individual with his own means, founds the institution or the community at large contributes the funds. The position in law is the same and the intention in either case must be to found an institution for the benefit of a minority community by a member of that community. It is equally irrelevant that in addition to the minority community others from other minority communities or even from the majority community can take advantage of these institutions. Such other communities bring in income and they do not have to be turned away to enjoy the protection.

9. The next part of the right relates to the administration of such institutions. Administration means management of the affairs of the institution. This management must be free of control so that the founders or their nominees can mould the institution as they think fit, and in accordance with their ideas of how the interests of the community in general and the institution in

particular will be best served. No part of this management can be taken away and vested in another body without an encroachment upon the guaranteed right.

10. There is, however, an exception to this and it is that the standards of education are not a part of management as such. These standards concern the body politic and are dictated by considerations of the advancement of the country and its people. Therefore, f Universities establish the syllabi for examinations, they must be followed subject, however, to special subjects which the institutions may seek to teach, and to a certain extent the State may also regulate the conditions of employment of teachers and the health and hygiene of students. Such regulations do not bear directly upon management as such although they may indirectly affect it. Yet the right of the State to regulate education, educational standards and allied matters cannot be denied. The minority institutions cannot be allowed to fall below the standards of excellence expected of educational institutions, or under the

guise of exclusive right of management, to decline to follow the general pattern. While the management must be left to them, they may be compelled to keep in step with others."

2) The Ahmedabad St. Xaviers College Society and another etc. v. State of Gujarat and another (AIR 1974 (2) SC 1389). Therein the Apex Court has held as follows:

"The right conferred on the religious and linguistic minorities to administer educational institutions of their choice is not an absolute right. This right is not free from regulation. Just as regulatory measures are necessary for maintaining the educational character and content of minority institutions similarly regulatory measures are necessary for ensuring orderly, efficient and sound administration. Das, C.J., in the Kerala Education Bill case 1959 SCR 995 = (AIR 1958 SC 956) (supra) summed up in one sentence the true meaning of the right to administer by saying that the right to administer is not the right to mal-administer.....An educational institution runs smoothly when the

teacher and the taught are engaged in the common ideal of pursuit of knowledge. It is, therefore, manifest that the appointment of teachers is an important part in educational institutions.....Regulations which will serve the interests of the students, regulations which will serve the interests of the teachers are of paramount importance in good administration. Regulations in the interest of efficiency of teachers, discipline and fairness in administration are necessary for preserving harmony among affiliated institutions."

3) T.M.A. Pai Foundation and Others v. State of Karnataka and Others (AIR 2003 (1) SC 355).

4) Bal Patil And Another v. Union of India and Others

((2005) 6 SCC 3902). Therein, the Court, inter alia, held as follows:

"The Constitution has accepted one common citizenship for every Indian regardless of his religion, language, culture or faith. The only

qualification for citizenship is a person's birth in India. We have to develop such enlightened citizenship where each citizen of whatever religion or language is more concerned about his duties and responsibilities to protect rights of the other group than asserting his own rights. The constitutional goal is to develop citizenship in which everyone enjoys full fundamental freedoms of religion, faith and worship and no one is apprehensive of encroachment of his rights by others in minority or majority.....The constitutional idea, which can be gathered from the group of articles in the Constitution under the chapters of fundamental rights and fundamental duties, is to create social conditions where there remains no necessity to shield or protect rights of a minority or majority."

3. He would contend, therefore, that a perusal of the aforesaid Judgments would show that the right available to a religious minority institution under Article 30 is not absolute. It is open to the State to frame regulations cutting down the amplitude the right available to a minority community, it is

submitted. In this context, he invited my attention to Rules 44 and 44(a) of Chapter XIV A KER. He would contend that Rule 44 contemplates appointments to the post of HM being premised on the principle of seniority. It is not, therefore, open to the minority institution to overlook the statutory regulation of a seemingly absolute power which in reality is not an absolute power, he submits. The receipt of financial aid from the State would result in forfeiture of the right, at any rate, in a minority institution to appoint any person of its choice in a capricious manner, it is contended. Being confronted with a Full Bench decision of this Court in Kurian Lizy v. State of Kerala (2006 (4) KLT 264), learned counsel would invite my attention to certain paragraphs, which I shall refer to in greater detail, to contend that the minority community does not enjoy the right, at any rate, to choose any person even without reference to a comparative evaluation of the candidates available for appointment as HM, when the candidates are drawn from the same community.

4. Per contra, learned counsel appearing for the fourth respondent, Shri K. B. Gangesh, would contend that the matter is no longer res integra, and it is a matter covered by unbroken line of decisions in support of the proposition that the minority institutions have an unqualified right to appoint a person of its choice, the only limitation on the right being that the person chosen must be a person who is qualified. He, no doubt, emphasises that any controversy that may have arisen following the Judgment of the Division Bench in Varkey v. State of Kerala (2005 (2) KLT 468) which struck a discordant note following certain observations in TMA Pai's case has been closed by the Full Bench. In the recent decision of this Court in Malankara Syrian Catholic College v. Jose (2007 (1) KLT 22), the Apex Court, though no doubt, dealing with the case of appointment to the post of Principal in Aided College, has put matters beyond the pale of any dispute by taking the view that extension of aid by the State cannot deprive a minority institution of its right to appoint a person of its choice as the Principal, he submits.

Learned Government Pleader would point out that the vacancy in this case arose on 31.3.2005. He would submit that the petitioner has already retired on 31.3.2006.

5. Each decision is only authority normally for what it decides. A search for the dictum of a case cannot be divorced from the inevitable need to examine the factual context besides the legal frame-work within which the lis fell for resolution by the Court. A judgment is not to be read as a Statute. It is no doubt true, as contended by the learned counsel for the petitioner, Shri N.P. Samuel, that the Apex Court has held that the right enjoyed by the minority institution is not an absolute right. But again, as correctly pointed out by Shri K.B. Gangesh, counsel for fourth respondent, it is to be examined in what context the Court laid down the same. (The content of the right which was pronounced as not absolute was as regards matters like regulation regarding standards of education, prescription of syllabus and the like.) The right enjoyed by the minority institution is essentially a right to establish and administer.

Undoubtedly, it embraces a bundle of rights. It cannot be in the region of dispute that the post of HM is a pivotal post. It is in regard to the right to appoint HM that we have to examine whether the decisions relied on by the learned counsel for petitioner can apply in the manner he contends. I am of the view that the reference made by petitioner to the decisions in State of Kerala, etc. v. Very Rev. Mother Provincial, etc. (AIR 1970 SC 2079), The Ahmedabad St. Xaviers College Society and another etc., v. State of Gujarat and another (AIR 1974 SC 3089), and T.M.A. Pai Foundation and Others v. State of Karnataka and Others (AIR 2003 SC 355), cannot be of any assistance in advancing her case. As already found by me, this is a question which is specifically answered as contended by the learned counsel for fourth respondent, in the Full Bench decision. As far as the contention that the minority institution does not enjoy an absolute right is concerned, I am afraid that the contention is in the teeth of the dictum of the Full Bench in Kurian Lizy v. State of Kerala (2006 (4) KLT 264). In fact, a Bench of this

Court in Varkey v. State of Kerala (2005 (2) KLT 468) (speaking through His Lordship Justice Shri M. Ramachandran) took the view that in the light of the observations in the TMA Pai's case, there is a change brought about in the position of law. However, another Division Bench in Annie Francis v. D.E.O., Aluva (2005 (3) KLT 238) took the view that minority institutions have a right to appoint a person of its choice provided that the person is qualified. The Full Bench after elaborate consideration of the matter and with particular reference to the observations of the Apex Court in TMA Pai's case came to the conclusion that the decision in Annie Francis v. D.E.O. Aluva (2005 (3) KLT 238) was correct and it was affirmed. The Court held as follows:

> "The Division Bench in *Annie Francis*'s case (supra), we are of the view, came to the correct conclusion and, thus, rightly held that the Supreme Court in *T.M.A. Pai Foundation*'s case (supra) had not impliedly overruled the law as laid by this Court referred to above."

Further it held as follows:

> "We, thus, hold that the management of a minority educational institution would have freedom to appoint Headmaster or Principal. R.44(1) of the Rules of 1959 would have no control over the powers conferred under Art. 30(1) of the Constitution, although such institution has necessarily to evolve a rationale procedure for selection of the Headmaster or Principal".

In the light of this, it is clear that whatever cloud there was, over the right of the minority, in view of the Judgment in Varkey v. State of Kerala (2005 (2) KLT 468), it stands cleared by the Full Bench by virtue of the Judgment which was decided on 16.8.2006. In view of the Judgment of the Full Bench and that of the Apex Court in Malankara Syrian Catholic College v. Jose (2007 (1) KLT 22), there cannot be any manner of doubt that a minority institution enjoys a right which can be described as absolute in the sense that it can appoint any person who is qualified as HM. It is also clear that in the light of the aforesaid

decisions, the contention of the learned counsel for petitioner that this right is diluted and destroyed in the case of an institution which receives aid is untenable and it is accordingly repelled. The last contention of the petitioner is that this right should not be available to be invoked as against the members of the very same community. In fact, the acceptance of this argument would really amount to defeating the right under Article 30. In the context of the post of Prncipal, in an Aided College, the Apex Court had this to say in Malankara Syrian Catholic College v. Jose (2007 (1) KLT 22):

> *"28. The appellant contends that the protection extended by Art. 30(1) cannot be used against a member of the teaching staff who belongs to the same minority community. It is contended that a minority institution cannot ignore the rights of eligible Lecturers belonging to the same community, senior to the person proposed to be selected, merely because the institution has the right to select a Principal of its choice. But this contention ignores the position*

> *that the right of the minority to select a Principal of its choice is with reference to the assessment of the person's outlook and philosophy and ability to implement its objects. The management is entitled to appoint the person, who according to them is most suited, to head the institution, provided he possesses the qualifications prescribed for the posts. The career advancement prospects of the teaching staff, even those belonging to the same community, should have to yield to the right of the management under Art. 30(1) to establish and administer educational institutions."*

No doubt, learned counsel for petitioner would draw sustenance from the dictum of the Full Bench in Kurian Lizy v. State of Kerala (2006 (4) KLT 264) wherein the Full Bench proceed to hold as follows:

> *"In this context, we feel that some directions should be issued to the Managements of minority educational institutions, to evolve a procedure for selection to the post of Headmaster, in the light of the observations in the answer to*

question 5(c) in T.M.A. Pai Foundation's case (supra) quoted above. We notice that in many cases senior teachers belonging to the minority community, which runs the institution are superseded without assigning any reason. Art. 30(1) of the Constitution of India is an armour to protect the minority against the legislative and executive actions of the State, which is normally controlled by the majority. The said armour cannot be used as a weapon against other members of the same minority community. The protection under Art. 30(1) is to the minority community and for the minority community. The Manager may supersede the members of other communities and also members of the minority community, who are found unsuitable for promotion to the post of Headmaster. But there my be teachers, who are, in every respect, qualified and suitable to head a minority educational institution. The management may select the best among them. The selection procedure should be fair, reasonable and transparent. The eligible members of the minority community may not have a feeling that

> *they have been superseded without any valid grounds. So, all minority educational institutions, which propose to select the best person to the post of Headmaster/Principal of a School or College, as the case may be, ignoring seniority in the feeder category or ignoring the available teachers, should frame and publish regulations or bye-laws, containing a transparent procedure, governing such selection. The publication can be made in the Notice Board of the educational institution concerned and a copy of it should be available in school/college library for reference. When superseding a senior qualified member of the minority community the reasons thereof should be clear from the records."*

6. I am afraid for more reasons than one, I find little merit in the said contention. In the first place, I would think that the observations and directions should be understood as being operative prospectively as contended by counsel for fourth respondent and Government Pleader. Going through the

directions issued and the observations made, it is clear that the minority institutions were directed to frame norms to affix in the Notice Board and to give reasons whenever senior claimants from the same community were overlooked and to make available reasons in the records. In this case, the appointment took place in respect of a vacancy which arose on 31.3.2005. Petitioner has in fact retired on 31.3.2006. I would also think that the observation of the Apex Court in paragraph 28 of the Judgment which I have already adverted to, does appear to take the view which is contrary to the view taken by the Full Bench.

Accordingly, the Writ Petition is dismissed.

K. M. JOSEPH, JUDGE

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